IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 363 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ABDUL MULTIF USMANBHAI SHAIKH

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 363 of 1997

MR MH BAREJIA for Appellant No.

MR US BRAHMBHATT for Appellant No.

MR RC KODEKAR, APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 29/04/2005

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE AKSHAY H.MEHTA)

1. The appellant in this appeal has challenged his conviction under sections 302 and 498A of the Indian Penal Code [IPC] and order of sentence imposing imprisonment for life and to pay fine of Rs.200/= for offence under section 302 of the IPC, in default RI for one month and for offence under section 498A RI for six months and to pay fine of Rs.100/=, in default further RI for 15 days. The judgment of the trial Court is dated 11th March, 1997.

2. The appellant was prosecuted for the aforesaid offences in the Court of the Ld. Addl. City Sessions Judge, Ahmedabad in Sessions Case No. 261 of 1995 for alleged commission of offences made punishable under sections 302, 498A read with section 34 of the IPC. He was prosecuted alongwith three other original accused, namely original accused no. 2 Faij Mahmed alias Babu Usmanbhai, original accused no. 3 - Noorbibi Usmanmiya and original accused no. 4 Roshanbanu, wife of Faij Mahmed . According to the prosecution, the incident took place on 20th April, 1995 around 12.30 afternoon. It was alleged that the appellant doubted the chastity of the deceased, who happened to be his wife and for that reason they had quarrel on the day of incident. Taking his side, his mother Noorbibi and his brother Faij Mahmed alias Babu Usmanbhai and sister-in-law Roshanbanu also started quarreling with the deceased. It was further alleged that the appellant and other accused told the deceased that she was not of good character and she should leave the house so that they could bring another wife for the appellant. The quarrel increased, during which accused no. 3 Noorbibi poured kerosene from the can which was lying in the house on the body of the deceased and she thereafter ignited her with match-stick. The deceased raised shouts for help. Accused no. 4 Roshanbanu did not permit her to cross the door and she blocked it by standing in the middle of the door. It was further alleged that the appellant and accused no. 2 Faij Mahmed alias Babu Usmanbhai instigated their mother to burn the deceased. On hearing the shouts, prosecution witness Mumtajali came there running and he tried to extinguish the fire by throwing a quilt over the burning clothes of the deceased. After the fire was put out the deceased was taken to the hospital in a rickshaw. She was admitted in the L.G. Hospital at Maninagar in the burns ward.

2.1. Dr. Rajen Natvarlal Contractor, Resident Doctor of the L.G. Hospital admitted her and started her treatment. Upon inquiry the deceased gave the history of the incident which is recorded by the doctor in his case papers. It is noted as "homicidal attempt with flames of a stove."

2.2. In the meanwhile, the Police Head Constable on duty at the hospital, namely Surajsing Ratansing attached to Vatva Police Station went to the patient and inquired from her how she had received burns. She told him that it was her husband who threw kerosene on her and ignited her because there was a quarrel between the two during which she made allegations against him and the appellant against her doubting the character of each other. Shortly thereafter, the First Information Report [FIR] was recorded by the Police Inspector, Maninagar Police Station. In the said FIR it was stated that her husband quarreled with her suspecting her to be of loose character and hearing the quarrel, her mother-in-law Noorbibi and sister-in-law Roshanbanu came there and they also started quarreling with her. They alleged that the deceased was not of good character and, therefore, she should leave the house so that another lady can be brought home as a wife for the appellant. She thereafter alleged that her mother-in-law poured kerosene over her and ignited her with match-stick. She raised shouts and tried to get out of the house, but Roshanbanu blocked her way by standing in middle of the door. On receipt of the FIR, the Inspector registered offence against the appellant and the original accused and commenced investigation. During the investigation, he arrested the culprits and also recorded statements of various persons acquainted with the facts of the case and drew panchnamas and also completed other formalities. At the end of the usual investigation, he submitted charge-sheet in the Court of the concerned Magistrate, who in turn committed the case to the Court of Sessions since offence under section 302 of the IPC is exclusively triable by the Court of Sessions.

2.3. At the trial, the learned Judge framed charge at Exh. 1 on 17th October, 1995. The appellant and other accused pleaded not guilty and claimed to be tried.

2.4. The prosecution, in support of its case, examined 12 witnesses and also produced documentary evidence in the form of the FIR, panchnamas and the autopsy report, etc. After the recording of the evidence was over, further statements of the appellant and other accused were recorded. It appears that no specific defence was

taken by them, but their defence was that of general denial.

2.5. At the end of the trial the learned Judge found the appellant guilty of committing offence under section 302 of the IPC and sentenced him to suffer imprisonment for life as stated above.

3. We have perused the record of the case with a view to reappreciate the evidence. We have also considered the submissions of Mr. US Brahmbhatt, learned advocate for the appellant as well as Mr. RC Kodekar, Ld. APP for the State.

3.1. From the record it is clear that the deceased was married to the appellant, but he suspected her to be of loose character. The span of marriage was six years. It further appears that the deceased also suspected the appellant having relations with others and, therefore, there was continuous quarrel going on in the family. On the day of incident, the deceased was removed to the hospital with burn injuries i.e. on 20th April, 1995 and she expired on 25th April, 1995 in the hospital during treatment.

3.2. According to Mr. Brahmbhatt, the case of the prosecution does not conclusively prove the guilt of the appellant and, therefore, his conviction under sections 302 and 498A of the IPC is erroneous. According to him, the eye witnesses have not supported the prosecution and, therefore, the case hangs on circumstantial evidence. According to the circumstances, which are on record, are not good enough to conclusively prove the guilt of the appellant. He has, therefore, submitted that this appeal deserves to be allowed.

3.3. As against that, Mr. RC Kodekar, Ld. APP for the State has supported the judgment and has submitted that there are dying declarations on record which alone are sufficient to base conviction of the appellant. In his submission the trial Court has not committed any error in holding the appellant guilty for committing offences under sections 302 and 498A of the IPC. Lastly he has submitted that the appeal deserves to be dismissed.

4. The prosecution has examined several persons residing in the locality in which the incident took place. The locality is known as Nava Chandola Talav, Navabnagar. They are P W 1 - Jahedabanu Mohmed Hanif Exh. 18, P W 2 - Noorjaha Amanmiya Exh. 19, P W 3

Bismilabibi Idubhai Shaikh Exh. 20 and P W 5 Mumtajalam Jahoor Ahmed Exh. 25. These witnesses have turned hostile and they have not supported the case of the prosecution. However, the prosecution has also placed on record the dying declarations made by the deceased, recorded at different stages and has also placed reliance on certain other circumstances to prove the guilt of the appellant. Since the witnesses residing in the aforesaid locality have turned hostile, we are not reproducing their evidence in our judgment. However, the short question that would arise for our consideration would be whether the dying declarations made by the deceased are good enough to bring home the charge against the appellant.

4.1. The first dying declaration appears to have been made before the Medical Officer, namely P W 10 - Rajen Natvarlal Contractor Exh. 35. He has stated that on 20th April, 1995, while he was discharging duty as Resident Doctor in LG Hospital, the deceased was brought to the hospital at about 1.50 hours and on inquiry she gave the history of the incident. That had been noted down in the case papers. If the case papers are perused, it appears that history of the incident had been noted as under :-

> "Alleged H/o burns due to flame of kerosene stove. "Homicidal attempt" today at 1.00 pm. on 20/4/1995."

Thus, the history before the Medical Officer given by the deceased speaks only of attempt of homicidal death and nothing more. It is not stated who made the attempt and for what reason.

4.2. It further transpires from the record that subsequently Head Constable Surajsing went to the patient and inquired how the incident took place. The Head Constable noted down the information given to him and passed it on to Maninagar Police Station which was received by the P S O Kesarisinh of the said Police Station on 20th April, 1995. The said Vardhy reflects that Head Constable Surajsing was informed by the deceased that she had a quarrel with her husband on account of both of them accusing each other of doubtful character and in the quarrel her husband poured kerosene over her and ignited her. The Vardhy was received at the police station at 2.25 pm on 20th April, 1995, which is on record at Exh. 32.

4.3. On the basis of the said Vardhy, the concerned Inspector went to the patient and recorded her FIR,

details of which have already been stated above. It may be noted that in the FIR the deceased has alleged that it was her mother-in-law who poured kerosene over her and ignited her with match-stick and her sister-in-law did not permit her to leave the room by obstructing her way. At that time the appellant was telling her mother-in-law that the deceased should be burnt alive.

4.4. Since in the instant case the lady received burns and she was hospitalized, the arrangement to record dying declaration was made by the police and P W 7 - Christofar John Christian Exh. 28 was directed to go to the hospital and to record her dying declaration. The dying declaration is at Exh. 30. In response to the questions put by the witness to her, she stated that on 20th April, 1995 while she was in the house, her husband, the mother-in-law, the brother-in-law and the sister-in-law were beating her. They were causing her mental harassment. She further stated that on the day of incident, her sister-in-law caught hold of her and mother-in-law as well as the husband poured kerosene over her and ignited her.

5. Now considering the aforesaid dying declarations made by the deceased to different persons there is variance in them. There is no consistency in the versions of the incident as narrated by the deceased. So far the very first dying declaration is concerned, it is in the form of history given to the Medical Officer which does not involve any of the accused though it says that there was an attempt of homicide.

5.1. So far the Vardhy given by the Head Constable is concerned, it reflects that it was the appellant alone who caused burns to her by pouring kerosene over her and burning her. So far the First Information Report is concerned, the blame of igniting her is thrown on the mother-in-law. The role attributed to the appellant is that he only instigated his mother to burn her. In the dying declaration made before the Executive Magistrate, as stated above, she implicated her sister-in-law. She stated that her sister-in-law had caught hold of her; whereas her mother-in-law and her husband i.e. appellant poured kerosene over her and ignited her. In view of these different versions contained in the dying declarations, it is difficult to accept any of them. There is no other cogent, reliable and independent evidence led by the prosecution which could corroborate any of the dying declarations. In fact in the FIR the role that has been attributed to the appellant is only to the extent of instigating his mother and nothing else.

In view of such situation, it is difficult for us to agree with the finding given by the trial Court that the prosecution had proved beyond reasonable doubt the guilt of the appellant. Considering the facts, the possibility of suicide cannot be ruled out. Though the evidence of Dr. Deven Govindbhai Desai P W 6, Exh. 26 and Dr. Rajen Natvarlal Contractor P W 10, Exh. 35 conclusively proved that the death of the deceased was not natural one and she died of burns, the evidence of neither of these witnesses throws any light whether the burns were homicidal or suicidal. No-doubt in the case history recorded by Dr. Rajen Natvarlal it has been mentioned that attempt to commit homicide is made but by whom it is not stated. In view of such state of evidence it is not possible for us to hold the appellant guilty for the offence with which he is charged. The net conclusion of the aforesaid discussion is that the prosecution has not been able to prove the guilt of the appellant beyond any reasonable doubt. Even the trial Court has come to the conclusion that so far three original accused are concerned, they have been falsely implicated by the deceased and it has acquitted them; to us, even the participation of the appellant in the incident appears to be doubtful. This appeal is, therefore, allowed.

In view of the aforesaid, the order of conviction recorded by the trial Court of the appellant for offence under sections 302 and 498-A of the IPC is quashed and set aside. Consequentially the order of sentence imposing imprisonment for life and fine of Rs.200/= for offence under section 302 of the IPC and RI for six months and fine of Rs.100/= for offence under section 498-A of the IPC is also quashed and set aside. The appellant at present is enlarged on temporary bail by this Court. He may, therefore, report to the jail authorities for completing the formalities, but he shall not be required to surrender to the custody.

Fine, if paid, is ordered to be refunded to the appellant.

Muddamal articles to be destroyed in terms of the direction of the trial Court.

[KSHITIJ R. VYAS, J.]

[AKSHAY H. MEHTA, J.]

* Pansala.